Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
PETITIONER

v.

HYDROLEVEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

BARRY GROSSMAN
MARK C. DEL BIANCO
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ERNEST J. ISENSTADT
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether petitioner is responsible for antitrust violations committed by its agents acting within the scope of both their actual and their apparent authority.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
The parties to this proceeding	1
The conspiracy to prevent Hydrolevel from marketing its product	5
Proceedings in the district court	9
The decision of the court of appeals	12
Introduction and summary of argument	13
Argument	15
ASME is accountable to Hydrolevel for antitrust injuries resulting from the conduct of ASME's agents acting within the scope of either their actual or their apparent authority	15
I. Because the jury found ASME liable under a charge to which ASME offered no objection, the jury's finding of liability should be affirmed	15
II. The district court's charge to the jury was more favorable to ASME than the law requires	16
A. Corporations are liable for restraints of trade, inflicted by agents acting within the scope of their actual authority, even if the agents act in part for the purpose of benefiting themselves or third parties	17
B. Corporations are liable for restraints of trade, inflicted by their agents acting within the scope of their apparent authority, even if the agents act solely for the purpose of benefiting themselves or third parties	21
III. Requiring ASME to account for the misconduct of its agents, who exercised expressly delegated authority to regulate the competitive process, will further the procompetitive goals of the federal antitrust laws	25
Conclusion	33

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. *Kress & Co.*, 398 U.S. 144	15
American Medical Association v. *United States*, 317 U.S. 519	17
Associated Press v. *United States*, 326 U.S. 1	17, 31
Bowman v. *Home Life Insurance Co.*, 243 F.2d 331	25
C.I.T. Corp. v. *United States*, 150 F.2d 85	19
Continental Baking Co. v. *United States*, 281 F.2d 137	19
Dark v. *United States*, 641 F.2d 805	25
Egan v. *United States*, 137 F.2d 369	19
Eliason Corp. v. *National Sanitation Foundation*, 614 F.2d 126	32
Employers' Liability Assurance Corp. v. *L. J. Marcotte Insurance Agency*, 314 F.2d 470	25
Fashion Originators' Guild v. *FTC*, 312 U.S. 457	14, 31
Gilmore v. *Constitution Life Insurance Co.*, 502 F.2d 1344	25
Gleason v. *Seaboard Air Line Ry.*, 278 U.S. 349	14, 24
Hatley v. *American Quarter Horse Association*, 552 F.2d 646	32
Hester v. *New Amsterdam Casualty Co.*, 412 F.2d 505	25
Holloway v. *Howerdd*, 536 F.2d 690	25
National Acceptance Co. of America v. *Coal Producers Association, Inc.*, 604 F.2d 540	25
National Society of Professional Engineers v. *United States*, 435 U.S. 679	17
New York Central & Hudson River R.R. v. *United States*, 212 U.S. 481	13, 18
Old Monastery Co. v. *United States*, 147 F.2d 905, cert. denied, 326 U.S. 734	19
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134	30
Pfizer, Inc. v. *India*, 434 U.S. 308	29
Philadelphia, Wilmington & Baltimore R.R. v. *Quigley*, 62 U.S. (21 How.) 202	18
Radiant Burners, Inc. v. *Peoples Gas Light Co.*, 364 U.S. 656	17, 31

Cases—Continued: Page

Reiter v. *Sonotone Corp.*, 442 U.S. 330 29
St. Johnsbury Trucking Co. v. *United States*, 220 F.2d 393 19
Silver v. *New York Stock Exchange*, 373 U.S. 341.. 31, 32
Standard Surety & Casualty Co. v. *Plantsville National Bank*, 158 F.2d 422 25
Stewart v. *Wright*, 147 F. 321 17
Texas Industries, Inc. v. *Radcliff Materials, Inc.*, No. 79-1144 (May 26, 1981) 23-24
Truck Drivers' Local No. 421 v. *United States*, 128 F.2d 227 24
United Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344 ..... 17, 18, 21, 25
United States v. *A&P Trucking Co.*, 358 U.S. 121.. 14, 19, 27
United States v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, cert. denied, 401 U.S. 948 25
United States v. *American Society of Mechanical Engineers*, [1972] Trade Cas. (CCH) ¶ 74,029.. 17
United States v. *Armour & Co.*, 168 F.2d 342 19
United States v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, cert. denied, 437 U.S. 903 25
United States v. *George F. Fish, Inc.*, 154 F.2d 798, cert. denied, 328 U.S. 869 19
United States v. *Hilton Hotels Corp.*, 467 F.2d 1000, cert. denied, 409 U.S. 1125 ..... 25, 27
United States v. *Illinois Central R.R.*, 303 U.S. 239 19
United States v. *Johnston*, 268 U.S. 220 16
United States v. *Sanchez*, 521 F.2d 244 25
United States v. *Wise*, 370 U.S. 405 29
Zito v. *United States*, 64 F.2d 772 19

Statutes and rule:

Clayton Act, 15 U.S.C. (& Supp. III) 12 *et seq.*:
Section 4A, 15 U.S.C. 15a 1
Section 14, 15 U.S.C. 24 29
Section 15, 15 U.S.C. 25 1

Statutes and rule—Continued: Page

Sherman Act, 15 U.S.C. 1 *et seq.*:
Section 1, 15 U.S.C. 1 ..... 1, 10, 17, 29
Section 2, 15 U.S.C. 2 ..... 1, 10, 17, 29
Section 7, 15 U.S.C. 7 ..... 17, 29
Federal Trade Commission Act, 15 U.S.C. (& Supp. III) 41 *et seq.*:
Section 5(b), 15 U.S.C. 45(b) 1
Section 6(g), 15 U.S.C. 46(g) 1
Fed. R. Civ. P. 51 15

Miscellaneous:

51 Cong. Rec. (1914):
p. 9676 29
p. 15820 29
10 W. Fletcher, *Cyclopedia of the Law of Private Corporations* (rev. ed. 1978) 19, 25
Hearings on Voluntary Industrial Standards Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 94th Cong., 1st Sess. (1975) 28
2 F. Mechem, *Agency* (2d ed. 1914) 25
Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 Colum. L. Rev. 1486 (1966) 32-33
Restatement (Second) of Agency (1958) 14, 16, 19, 20, 22, 23
L. Sullivan, *Antitrust* (1977) 33
D. Turner, *Consumer Protection By Private Joint Action*, Antitrust Law Symposium (1967) 32

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1765

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., PETITIONER

v.

HYDROLEVEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcing the federal antitrust laws, has a substantial interest in protecting the economy against anticompetitive practices carried on by incorporated and unincorporated entities acting through their officers, employees, and other agents. The government's ability to obtain effective injunctive relief, preventive administrative remedies, civil damages, and criminal fines from artificial entities depends on a continued recognition of traditional principles of *respondeat superior* in antitrust cases. See 15 U.S.C. 1, 2, 15a, 24, 25, 45(b), 46(g).

STATEMENT

The parties to this proceeding

1. Petitioner American Society of Mechanical Engineers, Inc. (ASME) is a technical and scientific association, organized in the form of a nonprofit corporation under the laws of New York (Pet. App. A-3; C.A. App.

675).[1] ASME has more than 90,000 members drawn from all fields of mechanical engineering. It has an annual operating budget of more than $12,000,000, derived from dues and sales of its publications. ASME conducts its affairs through a full-time staff as well as certain members who receive appointments to its committees (Pet. App. A-3).

Since its formation, ASME has promulgated Codes prescribing standards in numerous areas of engineering and commercial concern. As ASME notes in its brief in this Court (Br. 2), its various Codes have been "incorporated by reference" into the rules of federal regulatory bodies and the legislation of "most states, major cities, and all of the provinces of Canada." Accordingly, ASME's Codes have great influence in the marketplace and directly affect the ability of a company to market a product falling within the coverage of the Codes (Pet. App. A-3; C.A. App. 232-234, 422-423, 474-476, 730-731).

ASME operates pursuant to a constitution that sets forth its corporate purposes and authority (C.A. App. 678). The governing body of ASME is known as the Council. In 1911, the Council established a "Boiler and Pressure Vessel Committee" (*id.* at 681; A. Exh. V. 173-174). At that time, the Boiler and Pressure Vessel Committee received an express delegation of authority from the Council to "supervise the activities of the Society in connection with the 'ASME Boiler and Pressure Vessel Code' including the formulation, revision and interpretation of this Code" (A. Exh. V. 174; C.A. App. 681-682, 878-879).[2]

---

[1] "C.A. App." refers to the joint appendix in the court of appeals. "H. Exh. V." refers to the exhibit volumes filed in the court of appeals by respondent Hydrolevel Corporation. "A. Exh. V." refers to the exhibit volumes filed in the court of appeals by petitioner ASME. "J. App." refers to the Joint Appendix in this Court.

[2] The Boiler and Pressure Vessel Committee thus received "express corporate authority" to interpret the Boiler and Pressure Vessel Code and to act on behalf of the governing Council of ASME with respect to the Code (J. App. 120).

The regulations of the Boiler and Pressure Vessel Committee, in turn, expressly authorize the Committee to delegate certain functions to Subcommittees "needed to accomplish its objectives" (A. Exh. V. 180). Subcommittees perform their appointed duties and exercise their responsibilities on a continuing basis (*id.* at 181; C.A. App. 881). Among other responsibilities, Subcommittees respond to public "inquiries" about the proper interpretation of the Boiler and Pressure Vessel Code following referral of such inquiries from the Secretary of the Boiler and Pressure Vessel Committee (A. Exh. V. 184). If an inquiry "can be answered by direct reference to the [Boiler and Pressure Vessel] Code" (*ibid.*), the Chairman of the relevant Subcommittee is authorized to prepare a draft response to be sent to the inquiring party by the Secretary of the Boiler and Pressure Vessel Committee (*ibid.*; C.A. App. 903-907).

ASME's regulations categorize such responses as "unofficial" (A. Exh. V. 184). However, "unofficial" responses are written on formal ASME stationery, display the title of ASME and its Boiler and Pressure Vessel Committee, list all members of the Committee, bear the signature of the Secretary of the Committee, and purport to embody the views of the "Chairman of the concerned Subcommittee" on the "intent" of the Code (see C.A. App. 79). As the Secretary of the Boiler and Pressure Vessel Committee acknowledged, such responses from ASME have "the equivalent of official weight," and any reader of such a response would regard it as "official" (J. App. 125-126). The term "unofficial," as applied to such responses, is merely a matter of internal usage (*ibid.*).

Responding to public inquiries concerning the intent and application of ASME Codes is one of the organization's central functions (C.A. App. 646-649). Because receiving and responding to inquiries is instrumental in updating the Codes, ASME is "very much interested in learning from the people who may be having problems with the code[s]" and welcomes "this flow of inquiries" (*id.* at 655). Thus, "[i]t is through these inquiries being

fed to the committee that we keep the code[s] current with the safety needs and the technical * * * advances" (*id.* at 656, 1109).

2. Respondent Hydrolevel Corporation ("Hydrolevel") was organized in 1965 to develop and manufacture a "probe-type" fuel cut-off control for boilers. Hydrolevel's control was designed to cut off fuel supplied to boilers when their water ebbed to a dangerously low level (Pet. App. A-4). In contrast to existing cut-off devices, the newly-developed Hydrolevel control operated without moving parts through a probe device installed within the boiler. To prevent premature fuel cut offs resulting from surging and bubbling of water inside the boiler, the Hydrolevel control also incorporated a time delay element that allowed fuel to continue to flow for a brief period after the water fell below the level of the probe (*id.* at A-5).

Hydrolevel's principal competitor in the market for low-water fuel cut-off devices was McDonnell & Miller ("M & M"), the nation's leading manufacturer of such devices (Pet. App. A-4). M & M traditionally maintained 70%-85% of the national market in fuel cut-off devices (*ibid.*; H. Exh. V. 632, 651). The product manufactured by M & M depended on a "float" type mechanism. When the water in a boiler with a float mechanism sinks to a critical level, the change in position of the float trips an electronic switch connected to the float and cuts off the boiler's fuel (Pet. App. A-4).

Both Hydrolevel and its competitor, M & M, manufactured boiler components subject to the standards of the ASME Boiler and Pressure Vessel Code. Accordingly, compliance with the requirements of the Code was essential to their commercial success.[3] Section IV of the Code prescribes standards for boiler components, including low-water fuel cut-off devices. To ensure that such cut-off devices operate before the water in a boiler falls

[3] As ASME notes in its brief in this Court (Br. 5), the Boiler and Pressure Vessel Code "has been adopted in 46 states and all but one Canadian province."

to a dangerously low level, Paragraph HG-605 of Section IV of the Code requires that each boiler have " 'an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass' " attached to the outside of the boiler (Pet. App. A-4; A. Exh. V. 2).

M & M enjoyed a special advantage in assuring that its product complied with ASME's Code requirements and in competing against other companies that attempted to manufacture cut-off devices. John W. James, the Vice-President in charge of research at M & M, also served as the Vice-Chairman of the Section IV Subcommittee of ASME which drafted, revised, and interpreted Section IV of the Boiler and Pressure Vessel Code (Pet. App. A-5). James served for many years as Chairman or Vice-Chairman of the Section IV Subcommittee, and took a major part in revising the Code provisions governing boiler controls (C.A. App. 853). James' connection with ASME made him a valuable member of the M & M management team and he was compensated by M & M while performing ASME's work (J. App. 110). In a confidential memorandum, M & M emphasized James' value to the company stemming from his joint role at M & M and ASME (J. App. 86):

> John has been a senior management employee of M & M for over 25 years. * * * A major reason for the continued success at M & M is a result of his efforts and skill in influencing the various code making bodies to "legislate" in favor of M & M products. This has been a planned strategy for the business under E.N. McDonnell and carried out with considerable success as evidenced by the M & M market penetration of 70 plus %.

The conspiracy to prevent Hydrolevel from marketing its product

In early 1971, a major purchaser of low-water fuel cut-off controls (Brooklyn Union Gas Co.) decided to switch to Hydrolevel's probe-type device after years of

purchasing M & M's product (Pet. App. A-5). Brooklyn Union communicated that decision to M & M (H. Exh. V. 301-308). M & M then determined, in the words of the court of appeals, "to use ASME code interpretation procedures to stifle Hydrolevel's competition" (Pet. App. A-5).

To counter Hydrolevel's threat, M & M arranged two strategy meetings in Chicago, Illinois. Those meetings were attended by John W. James (Vice-Chairman of the ASME Section IV Subcommittee and Vice-President in charge of research at M & M), T.R. Hardin (Chairman of the ASME Section IV Subcommittee and Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company), James Solon (President of M & M), and Eugene Mitchell (Vice President of M & M) (Pet. App. A-5).[4] During the course of these meetings, the participants decided to send a letter to ASME's Boiler and Pressure Vessel Committee inquiring whether a cut-off with a time delay feature, of the kind manufactured by Hydrolevel, would comply with Paragraph HG-605 of the Code (*id.* at A-5 to A-6).

James and Hardin drafted a letter of inquiry to ASME's Boiler and Pressure Vessel Committee which they expected to produce a negative answer (Pet. App. A-6). They also discussed the substance of the response that ASME would send back to M & M (H. Exh. V. 236-237, 247-259).[5] Mitchell signed the letter on behalf of M & M, and sent it to W. Bradford Hoyt, the Secretary of the Committee. The letter inquired specifically whether Paragraph HG-605 of the Code permitted a low-

---

[4] International Telephone and Telegraph recently had acquired a controlling interest in Hartford, the company that employed Hardin. Shortly thereafter, ITT entered into negotiations to acquire M & M, which employed James, Solon and Mitchell. ITT completed its acquisition of M & M later in the year. Pet. App. A-5 n.2.

[5] James later destroyed the correspondence between himself and Hardin on this subject because he was "scared" that the correspondence would come to light (H. Exh. V. 247-252, 257-259, 329-339; J. App. 105-107).

water fuel cut-off device to "incorporate a time-delay feature" (J.A. 62).

When Hoyt received this inquiry, he processed it according to the regulations of the Boiler and Pressure Vessel Committee (Pet. App. A-6). As ASME acknowledges in its brief in this Court (Br. 8), the Boiler and Pressure Vessel Committee was "[f]ollowing standard procedures" in all respects in processing the inquiry. Those procedures allowed Hoyt to refer the inquiry to Hardin—the "Chairman of the appropriate Subcommittee"—to prepare a draft response (C.A. App. 864-867, 870, 878-879, 881; J. App. 121-124). Hardin treated the inquiry as a simple request for a construction of the Code and, accordingly, as requiring only his own attention (Pet. App. A-6 to A-7). This left Hardin with essentially "unsupervised control" over ASME's response—a response to an inquiry that he himself had drafted (*id.* at A-6).

Hardin prepared the response and sent it to Hoyt (J. App. 63). On April 29, 1971, Hoyt incorporated the response in a letter that bore the title and logo of ASME and listed all members of the Boiler and Pressure Vessel Committee (see C.A. App. 79; J. App. 64). Hoyt signed the letter in his capacity as Secretary of the Committee and purported to express the views of the "Chairman of the concerned Subcommittee" on the "intent of Par. HG-605(a)" of the ASME Boiler and Pressure Vessel Code (*ibid.*). Hoyt did not attempt to check the accuracy of the contents of the letter before mailing it (J. App. 124-126).

The first paragraph of ASME's letter referred to the requirements of Paragraph HG-605(a) of the Code and stressed the need for a positive cut-off mechanism. However, the second paragraph of the letter stated the following (J. App. 64):

> If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

The second paragraph of ASME's letter misdescribed the requirements of the code and had the effect—intended by Hardin, James, Solon and Mitchell—of branding as hazardous all cut-off devices incorporating a time delay feature. As the court of appeals noted, "[t]he second paragraph of this letter does not follow from the first" (Pet. App. A-7), and "draws * * * [a] misleading conclusion" (*id.* at A-8).[6] The second paragraph condemned Hydrolevel's product even though it could be installed substantially above the minimum low water level in boilers and effectively shut off their fuel supply before the water fell to a dangerous level (*ibid.*). Thus, ASME's letter "intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product" (Pet. App. A-12).[7]

M & M quickly made use of the misleading letter from ASME and diverted Hydrolevel's potential customers (Pet. App. A-8; J. App. 90, 92; C.A. App. 232-233, 403, 474-476). M & M instructed its sales force, which was armed with the letter, to inform potential customers that the Hydrolevel product is "very definitely * * * against the ASME Code" (H. Exh. V. 373-374). As ASME fully recognized, "if anyone saw that letter in the trade they

---

[6] The misleading character of this letter was recognized later by some of ASME's highest officials (see J. App. 82-84).

[7] Despite the adverse verdict of the jury in this case and the conclusion of the court of appeals that ASME's April 29, 1971, letter "intentionally misinterpreted the Code" (Pet. App. A-12), ASME persists in characterizing its misleading letter as "nothing more than a straightforward interpretation of the B-PV Code itself" (Br. 9). Before the jury, ASME presented witnesses who testified that, in rendering the interpretation, ASME was "only interested in making certain that the code is properly administered" (C.A. App. 649), and that the letter was a "reasonable and appropriate interpretation[] of the intent of the code" (*id.* at 930). In summation, defense counsel argued that there was nothing "wrong" with the ASME response to M & M's inquiry (*id.* at 1103-1109), and that the letter was not "rigged" (*id.* at 1106). Counsel also argued to the jury that the rendering of such interpretations was "[o]ne of ASME's functions," and that ASME "welcome[s]" the opportunity to provide answers to inquiries to assist it in developing the Code (*id.* at 1109-1110).

would view it as [having] the equivalent of official weight" (J. App. 126). M & M thus effectively utilized the misleading letter procured from ASME to stifle the competitive threat posed by Hydrolevel.

Nine months after ASME released the misleading letter, Hydrolevel learned of its existence and requested a copy from the Secretary of Subcommittee IV (J. App. 65). ASME surrendered a redacted copy of the letter but refused to furnish a complete copy or to disclose the identity of the party who requested the letter (Pet. App. A-8 to A-9; J. App. 115-116). Hydrolevel complained that the letter was false and asserted that it unfairly disparaged its product. Hydrolevel also demanded that ASME send a retraction to every person who received a copy of the letter (*id.* at A-9; J. App. 68-73). Instead of promptly publishing the requested retraction or forwarding it to Hydrolevel's potential customers, ASME sent an ambiguous response to Hydrolevel more than two months later (J. App. 84; compare *id.* at 99-100). That response, which James helped to draft (H. Exh. V. 240-244), "confirmed the intent" of the original letter but also stated that "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays * * *" (J. App. 84).

Despite this communication from ASME, Hydrolevel's product continued to meet substantial market resistance (J. App. 117). Hydrolevel later went out of business and sold the assets of the company (excluding the present cause of action) for $86,000 salvage value (Pet. App. A-11).

Proceedings in the district court

Hydrolevel brought suit against ASME, M & M, and Hartford Steam Boiler Inspection and Insurance Company in the United States District Court for the Eastern District of New York, alleging that the defendants had conspired to restrain trade and to monopolize the market for low-water fuel cut-off devices, in violation of Sections

1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[8] Much of the evidence of conspiracy, summarized above, focused on the activities of James (Vice-Chairman of ASME's Section IV Subcommittee and Vice-President at M & M) and Hardin (Chairman of ASME's Section IV Subcommittee and Executive Vice-President of Hartford).

At the conclusion of trial, the district court rendered a charge to the jury that, in the words of the court, was "essentially a defendant's charge" (C.A. App. 996). The court used "the defendant's instructions" (*id.* at 964), and melded them with its own standard charge (*ibid.*).[9] The Court repeatedly stressed that ASME could not be held liable unless it "intentionally joined the conspiracy" (J. App. 45) through "a meeting of the minds in an unlawful arrangement" (*id.* at 46). Thus, Hydrolevel was required to prove that "ASME knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy" (*ibid.*). The court also instructed the jury that "deliberate indifference, recklessness, * * * or stupidity or insensitivity" are not equivalent to willful adherence to a conspiracy (*id.* at 52).

The court further charged that, to establish a conspiracy to violate Section 1 of the Sherman Act, Hydrolevel must prove a scheme to inflict an unreasonable restraint of trade, which was "intended or * * * calculated to prejudice the public interest" (J. App. 51). To establish a conspiracy to monopolize, Hydrolevel must prove an agreement to dominate the low-water fuel cut-off industry, as well as an "intent to monopolize" that commerce, overt acts in furtherance of the scheme, and proximate injury to Hydrolevel (*id.* at 51). The court repeatedly emphasized that Hydrolevel must prove "that ASME intended to injure or destroy competition * * *"

---

[8] M & M and Hartford entered into settlements with Hydrolevel, leaving ASME to stand trial alone.

[9] The court added that "[t]he only instruction that I've taken from the plaintiff is the one dealing with the definition of a monopoly" (C.A. App. 964).

(*id.* at 52), and that, if ASME were "motivated solely by legitimate aims in this particular case," the jury must find against Hydrolevel (*ibid.*).

On the issue of *respondeat superior*, the district court adopted the substance of the charge proposed by ASME (J. App. 60-61). Thus, the court charged that ASME could be found to be a conspirator only through the actions of its officers or agents "acting within the scope of their employment or authority, and on behalf of and for the benefit of the corporation * * *" (J. App. 47). The court added that (*id.* at 48):

> Even if one or more of the members of the staff or of a committee or subcommittee of the defendant joined the conspiracy, that would not necessarily constitute a joining by the defendant. For the individual or individuals might be on an escapade or a frolic * * * of his own. They might even be keeping it secret from others, in order to prevent those in authority to scotch the scheme * * *.
>
> The participation by staff, officers or committees and subcommittees must have been sufficiently pervasive to make it fair and reasonable to say that they were acting on behalf of the defendant * * *.

Finally, the court charged the jury that (J. App. 49):

> If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

Following the delivery of this charge, ASME stated to the court that the charge was "[s]atisfactory to us" (C.A. App. 1192; J. App. 58).[10] With ASME's approval, the entire charge, as transcribed by the reporter, was given

---

[10] ASME's counsel objected only to the court's failure to give an instruction relating to certain remarks by Hydrolevel's counsel during trial (*ibid.*). That objection has no bearing on the issues now before this Court.

to the jury during its deliberations (C.A. App. 1195, 1206). After completing its deliberations, the jury returned a verdict in favor of Hydrolevel, finding ASME liable for a violation of the antitrust laws which caused injury to Hydrolevel (*id.* at 1207). Following a separate trial on the issue of damages, the jury found that Hydrolevel had suffered business losses as a result of the antitrust conspiracy which, when reduced to reflect prior settlements and trebled by the court, amounted to $7.5 million (Pet. App. A-11).

The decision of the court of appeals

The court of appeals affirmed the jury's verdict on the issue of liability (Pet. App. A-12 to A-19), but reversed the damage award as excessive and remanded for a new trial on the damage issue (*id.* at A-21 to A-26). On the issue of liability, the court explained that, given "the effect and intent of the April 29 interpretive letter * * *, the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product" (*id.* at A-12). The court of appeals also affirmed the jury's determination that ASME was responsible for the misconduct of its agents, although it applied a principle of *respondeat superior* different from that embodied in the district court's charge.

The court of appeals noted that the district court's charge required the jury to find either that ASME's agents acted to benefit ASME, or that ASME ratified the actions of its agents, before imposing liability (Pet. App. A-12 to A-13, A-19). The court of appeals saw no need to examine the sufficiency of the evidence under that instruction, however, because it concluded that the district court's charge on *respondeat superior* "was more favorable to the defendant than the law requires" (*id.* at A-19). In the court of appeals' view, a restraint of trade imposed by "a willful and knowing misrepresentation" of the requirements of the ASME code, made possible through use of the facilities, procedures and commercial reputation of ASME, should render ASME liable pursuant to the doctrine of "apparent authority" regardless of the motives

of its agents and without ratification (*id.* at A-13 to A-15). The court explained that, when "an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences" (*id.* at A-16). The court added (*id.* at A-14) that imposition of liability on ASME "will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injury competitors."

INTRODUCTION AND SUMMARY OF ARGUMENT

ASME argues that the decision of the court of appeals must be reversed because the court misconceived the doctrine of *respondeat superior*. However, the court of appeals upheld the jury's verdict imposing liability on ASME. And the trial judge instructed the jury on the issue of *respondeat superior* in the very terms proposed by ASME. ASME did not object to the trial judge's charge to the jury and did not challenge that charge on appeal. Accordingly, even if there were merit to ASME's contention that the court of appeals erred in its discussion of *respondeat superior*, there would be no basis for disturbing the jury's verdict finding ASME to be responsible for the wrongs of its agents.

Not only did ASME receive the charge that it requested, but that charge was "more favorable" to ASME than the law requires (Pet. App. A-19). The district court instructed the jury that, unless ratified by ASME, the acts of its agents should not be imputed to it if those acts were intended to benefit another person (J. App. 49). However, well-established principles of agency law provide that the acts of an agent, performed within the scope of his actual authority (*New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909)), are imputable to the principal even though they are intended to benefit another person if

those acts also are intended, even in part, to benefit the principal (*Restatement (Second) of Agency* § 236 (1958)). Moreover, in cases such as the present one, in which the principal lends its agents the facilities and apparent authority needed to inflict the injury complained of, the principal is liable even if the agents intend *solely* to benefit themselves or a third party (*Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349, 355-357 (1929)).

ASME's contrary view is that code-making bodies may plead ignorance and thereby immunize themselves from responsibility for actions of agents who invidiously exercise code-interpretation powers to the detriment of disfavored competitors. Judicial acceptance of such a plea would encourage code-making organizations to *minimize* their awareness and supervision of the activities of their own personnel. By contrast, if a code-making body is made to answer for restraints of trade inflicted by agents exercising delegated powers, "pressure [will be] brought on those who [control] the entity to see to it that their agents abide by the law" (*United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126 (1958)).

This incentive to comply with the law is particularly important in the case of an entity, such as ASME, which serves as an "extra-governmental agency" and effectively "prescribes rules for the regulation and restraint of interstate commerce * * *" (*Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941)). ASME's Codes have been incorporated by reference in the laws of most states in the nation. And, as the facts in this case demonstrate, those Codes can effectively block entry into the marketplace by new competitors and new products. Application of the antitrust laws to conspiracies to "legislate" (J. App. 86) against the products of disfavored competitors through misuse of the facilities of code-making bodies will encourage code-making bodies to guard against such improper practices.

ARGUMENT

ASME IS ACCOUNTABLE TO HYDROLEVEL FOR ANTITRUST INJURIES RESULTING FROM THE CONDUCT OF ASME'S AGENTS ACTING WITHIN THE SCOPE OF EITHER THEIR ACTUAL OR THEIR APPARENT AUTHORITY

I. Because The Jury Found ASME Liable Under A Charge To Which ASME Offered No Objection, The Jury's Finding Of Liability Should Be Affirmed

As the district court correctly observed, its charge was "essentially a defendant's charge," based in substantial part on proposed instructions tendered by ASME (see pages 10-11, *supra*). The court's charge on *respondeat superior* closely corresponded with the charge proposed by ASME (see J. App. 60-61). Rather than objecting to the charge, ASME declared that the charge was "[s]atisfactory" (J. App. 58). And it acknowledged in the court of appeals that the charge "was generally accurate" (C.A. Br. 18 n.*). Indeed, the charge given to the jury in this case mirrors the charge that ASME contends, in its brief in this Court, should be given in antitrust cases.[11]

Because ASME acquiesced in the charge given to the jury (see Fed. R. Civ. P. 51), and because it failed to challenge the validity of that charge in the court of appeals (see *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), ASME has no basis for complaining in this Court that liability was imposed on it pursuant to erroneous legal standards. Accordingly, even if there were merit to ASME's assertion (Br. 21) that the court of appeals erred in its discussion of the doctrine of *respondeat superior*, the court of appeals' judgment

---

[11] ASME argues (Br. 47) that Hydrolevel should have been required to prove "either that James and Hardin intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts." That is precisely what the district court charged the jury (J. App. 47-49, 52-53).

upholding the jury's verdict on the issue of liability should be affirmed.[12]

II. The District Court's Charge To The Jury Was More Favorable To ASME Than The Law Requires

Although the district court's imposition of liability may be affirmed on the ground that the charge rendered to the jury was not objected to by ASME, that charge should not receive the endorsement of this Court. As the court of appeals correctly observed (Pet. App. A-19), the district court's charge "was more favorable to the defendant than the law requires." If such a charge were adopted as a pattern or standard in the federal district courts, it would interfere seriously with the effective enforcement of the antitrust laws, not only by private plaintiffs in treble damage actions, but also by the United States in injunctive, damage, and criminal proceedings. As we demonstrate below, corporations are responsible for torts of their agents committed within the scope of their actual authority even if the agents intend primarily to benefit themselves or a third party.

---

[12] ASME did not raise among the questions presented in its petition for certiorari the question whether the evidence was sufficient to sustain the jury's verdict under the charge delivered by the district court. And, as this Court frequently has stated, it does not "grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the evidence was sufficient for the jury to impose liability on ASME under the district court's charge. The evidence summarized above (see pages 2-9, *supra*) showed that Hardin acted (in collaboration with James) within the scope of his expressly delegated authority in rendering the challenged interpretation of the ASME Code. See *Restatement (Second) of Agency* § 228 (1958). Moreover, as the district court concluded, the evidence introduced in this case supported the inference that ASME ratified or affirmed the actions of Hardin and James (J. App. 35-42; see also *Restatement (Second) of Agency* §§ 82, 93 and 94 (1958)). The jury also could have found that Hardin and James acted for the "benefit" of ASME since ASME's own witnesses repeatedly testified that the challenged actions were taken pursuant to established ASME procedures and were a necessary part of ASME's efforts to interpret and update the Code (see pages 3-4, 7-8 & note 7, *supra*).

Moreover, even if agents intend *solely* to benefit themselves or a third party, a corporation is responsible for torts of those agents if the corporation affords them the facilities and apparent authority needed to inflict the injury.

A. *Corporations are liable for restraints of trade, inflicted by agents acting within the scope of their actual authority, even if the agents act in part for the purpose of benefiting themselves or third parties*

1. The prohibitions of the Sherman Act apply to "[e]very person" (15 U.S.C. 1, 2), including "corporations" and "associations" (15 U.S.C. 7).[13] Corporations such as ASME, however, can act only through their officers, employees and agents. As Judge Hook observed long ago, "[w]hile a corporation has no brain to contrive, no tongue to deceive, and no hands with which to strike, it employs in its service the brains and tongues and hands of others, and as it can only operate through natural persons, there is * * * a correlative responsibility for the acts of those persons in the course of the corporate business and of their employment, and for any malicious and evil intent with which such acts are attended." *Stewart* v. *Wright*, 147 F. 321, 327 (8th Cir. 1906).

---

[13] There is no question that the Sherman Act applies to entities such as ASME. See *Radiant Burners, Inc.* v. *Peoples Gas Light Co.*, 364 U.S. 656 (1961) (upholding a Sherman Act complaint against the American Gas Association which allegedly had issued arbitrary standards to the detriment of a manufacturer of gas burners); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (upholding a Sherman Act complaint against a nonprofit membership association); *American Medical Association* v. *United States*, 317 U.S. 519 (1943) (upholding a Sherman Act complaint against a voluntary medical association which prescribed ethical codes for doctors); see also *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 392 (1922); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 682 (1978). ASME itself previously has entered into an antitrust consent decree. See *United States* v. *American Society of Mechanical Engineers*, [1972] Trade Cas. (CCH) ¶ 74,029 (S.D.N.Y. 1972).

Thus, the law traditionally has recognized that "for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible, under similar circumstances." *Philadelphia, Wilmington & Baltimore R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210 (1858). This fundamental principle of agency law applies in private treble damage actions under the Sherman Act, as in all other forms of corporate litigation. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation").

So firmly is the rule of *respondeat superior* entrenched in the field of corporate litigation that even criminal derelictions, committed by corporate agents within the scope of their delegated responsibilities, are imputable to the corporation. See *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909):

> [T]he subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company * * *. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress * * *. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

In short, it is well settled that, "[w]hen it is sought to hold a corporation liable for a tort, it is no answer for it to say that its agent or servant was not expressly authorized to commit the wrongful act, nor even that such act was contrary to or in violation of the instructions or orders given by it to the offending agent or serv-

ant, nor that the injury resulted from willful or wanton wrongdoing on the part of its employees in the course of their employment." 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations* 350 (rev. ed. 1978) (footnotes omitted); see also *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 244 (1938); *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126 (1958).[14]

2. The law of agency imputes liability to a corporation, based on the torts of its agents and employees acting within the scope of their actual authority, in any case in which the agents intend in part to serve the purpose of the corporation. This is true even if the agents also intend to serve their own selfish interest or the interest of a third party. See *Restatement (Second) of Agency* §§ 216, 236 (1958). Section 236 of the *Restatement* provides:

> Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.

---

[14] It is irrelevant that "the higher executives of the corporation, * * * took the utmost care to lay down for the guidance of the subordinate employees procedures designed to assure compliance with the regulation" (*St. Johnsbury Trucking Co.* v. *United States*, 220 F.2d 393, 398 (1st Cir. 1955) (Magruder, C.J., concurring)). Liability may be based on the acts of agents with low rank in the corporation (*United States* v. *George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946)), whose activities are wholly "routine" in nature (*United States* v. *Armour & Co.*, 168 F.2d 342, 343-344 (3d Cir. 1948)). Liability is imputed even though the corporation claims that the misconduct is "to its detriment" (*Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)), is "in contravention of written directions" (*Continental Baking Co.* v. *United States*, 281 F.2d 137, 150 (6th Cir. 1960)), is beyond the "knowledge" and consent of the corporation (*Zito* v. *United States*, 64 F.2d 772, 775 (7th Cir. 1933)), is "contrary to * * * instructions" (*Egan* v. *United States*, 137 F.2d 369, 379 (8th Cir. 1943)), or is beyond the scope of delegated authority because the agent has "no corporate power to commit such acts of bad faith" (*C.I.T. Corp.* v. *United States*, 150 F.2d 85, 89 (9th Cir. 1945)).

As Comment *a.* to Section 236 explains, liability may be imputed when the agent, although performing his principal's work, "is at the same time accomplishing his own objects or those of a third person which conflict with those of the master." Moreover, as Comment *b.* points out, "[t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment." The principal is liable unless the act of the agent "is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Restatement (Second) of Agency* § 235 (1958).

The district court's instruction to the jury in the present case failed to take account of this basic principle of agency law. The court instructed the jury (Pet. App. A-13) that liability could not be imposed on ASME if its "officers or agents act[ed] on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation * * *." As the authorities cited above clearly demonstrate, however, *respondeat superior* attaches to the torts of an agent acting within the scope of his assigned functions if the agent entertains even a subsidiary purpose to serve the objectives of his principal. It is immaterial that his "predominant" motive is to serve another party or his own interests.[15]

---

[15] In the present case, Hardin, acting in collaboration with James, performed the very function that was delegated to him under ASME's constitution and regulations. The evidence also demonstrated that the interpretive function served the corporate purposes of ASME. See pages 2-4, 6-8 & note 7, *supra*. Thus, the jury reasonably could find that Hardin and James were acting, at least in part, on behalf of ASME. In these circumstances, it is immaterial that James and Hardin sought to advance the interests of M & M at the same time that they exercised their delegated authority. See *Restatement (Second) of Agency* § 235 (Comment *a.*) (1958): "If, therefore, the servant does * * * the kind of act which he is authorized to perform, * * * there is an inference that he is acting within the scope of employment."

When an agent, acting within the scope of his actual delegated authority, entertains even a partial purpose to benefit his principal, there is no need for "ratification" by the principal. In cases such as the present case, therefore, the rule announced in *United Mine Workers* v. *Coronado Coal Co.*, *supra*, 259 U.S. at 393-396, has no application. *Coronado* concluded that an International Union could not be held responsible for the tortious conduct of the members of one of its local organizations. The strike at issue in that case was called and financed solely by the local organization. Moreover, under the constitutions of both the International Union and the local organization, the strike was a matter of local responsibility only. In those circumstances, liability could not be imposed on the International Union because it had not authorized, participated in, or ratified the strike, and there was no substantial claim that it had lent "an appearance of authority" to the local organization. 259 U.S. at 395. In the present case, by contrast, the agents guilty of misconduct exercised authority expressly delegated to them by their principal, and performed the very kinds of acts they were assigned to perform. The principal therefore is liable even if the actions of its agents were motivated in part by a desire to benefit a third party and even if the principal never ratified those actions.[16]

B. *Corporations are liable for restraints of trade, inflicted by their agents acting within the scope of their apparent authority, even if the agents act solely for the purpose of benefiting themselves or third parties*

Even if an agent acts with the sole purpose of benefiting himself or a third party, the corporate principal is responsible for violations of the antitrust laws if the principal lends the agent the facilities and apparent authority needed to execute the restraint of trade. For this

[16] As previously noted, moreover, the district court, in denying ASME's motion for a directed verdict, held that reasonable jurors could find "ratification" or acquiescence by ASME in this case. See page 16 note 12, *supra*.

additional reason, the court of appeals correctly concluded (Pet. App. A-13 to A-19) that the district court's charge to the jury in this case, which required Hydrolevel to prove that ASME's agents intended to benefit ASME, was "more favorable to the defendant than the law requires" (*id.* at A-19).[17]

1. The evidence adduced by Hydrolevel clearly established that ASME, through its express delegation of authority to Hardin and James, placed in the hands of its agents the mechanism needed to issue an authoritative yet fatally deceptive disparagement of Hydrolevel's product. As Section 219(2)(d) of the *Restatement (Second) of Agency* (1958) provides, a principal is liable for the torts of its agent if the agent purports "to speak on behalf of the principal and there was reliance upon apparent authority, or [the agent] was aided in accomplishing the tort by the existence of the agency relation." Thus, a principal is liable for "defamation" if the agent has "apparent authority" to speak for the principal. *Id.* at §§ 247 and 254. As Comment *c.* to Section 247 explains, "one who appears to have authority to make statements for the employer gives to his statements the weight of the employer's reputation. For this reason, the liability of the master may be based upon apparent authority. The motive of the spokesman and the position he holds are therefore immaterial if the master has apparently designated him to speak." Accordingly, "intent to serve the master or other principal" is not "determinative." *Ibid.*

Similarly, "misrepresentations" causing financial injury render the principal liable if apparent authority exists. *Restatement (Second) of Agency* §§ 249, 257, 261, 262 and 265 (1958). Such liability may be imposed even

---

[17] As discussed immediately above, the "actual authority" doctrine applies to the facts of this case even if ASME's agents had a partial purpose to benefit M & M. Nonetheless, we agree with the court of appeals that the "apparent authority" doctrine also applies in a case such as this. As we demonstrate below, the purpose of ASME's agents is not material in applying the apparent authority doctrine.

if the agent "acts wholly for his own purposes and hence is not acting in the scope of employment." Section 249, Comment *a*. Indeed, the principal is bound by the acts of an agent with apparent authority even though the agent "makes the misrepresentation from a motive other than that of serving the principal, or acts with a purpose of defrauding him." Section 257, Comment *d*.

Finally, and most pertinently, a principal is liable for "interference with business relations" inflicted by an agent if the agent acts within the scope of his "apparent authority." *Restatement (Second) of Agency* §§ 248 and 265 (1958). Once again, the agent binds the principal "irrespective of his motive." Section 248, Comment *b*.

In all of the instances cited above in which the principal is bound by the torts of an agent acting within the scope of his apparent authority, it is immaterial whether the harm is inflicted directly upon the plaintiff, or whether the harm befalls the plaintiff indirectly through deceit of third persons. Section 265 of the *Restatement (Second) of Agency*, Comment *a*., explains:

> The harm may also result from statements to third persons, as where one who, with the principal's knowledge, has acquired the reputation of being his spokesman, makes a speech which is defamatory of the plaintiff. * * * In the same way, the principal may be responsible for untrue statements which harm another in his business * * * or any other legally protected interest. In all of such situations, the motive of the apparent agent is immaterial unless known.

2. ASME attempts to convey the impression (Br. 21-35) that the foregoing principles of agency law, as codified in the *Restatement*, have no proper place in corporate litigation under the antitrust laws. In fact, however, these principles have been applied for many years in a wide variety of cases involving torts by corporate agents acting within the scope of their apparent authority.[18] These

---

[18] "[T]reble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort." *Texas Industries,*

principles apply with particular force under a federal statute such as the Sherman Act, which depends on effective deterrence of all persons participating in illegal restraints of trade. See pages 25-33, *infra*.[19]

The apparent authority principle adopted by the court of appeals in this case enjoys the sanction of Justice Stone's opinion for a unanimous Court in *Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349, 355-357 (1929), which imposed vicarious liability on a corporation based on a fraud practiced by one of its lower level agents. This Court emphasized that liability for false statements of an agent "is unaffected by his secret purpose or motives." *Id.* at 356. The Court rejected the notion that the principal should escape liability for deceit because the agent acted "without the principal's knowledge or consent" and inflicted an injury "to which his own negligence has not contributed." *Ibid.* The Court added that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." 278 U.S. at 356.[20]

Inc. v. *Radcliff Materials, Inc.*, No. 79-1144 (May 26, 1981), slip op. 3-4. There is no reason why, therefore, the agency principles traditionally applied in corporate tort actions should not apply in antitrust suits such as this. See the authorities cited in note 20, *infra*, applying the apparent authority doctrine in a wide variety of common law and federal regulatory cases.

[19] *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235-236 (8th Cir. 1942), relied on by ASME (Br. 23), does not suggest a different result. In that criminal prosecution, the court of appeals declined to impute the actions of a division of a labor union to the whole union. The court relied on the insufficiency of the government's evidence and "the specific limitation which the record uncontradictedly shows * * * upon the authority of the milkmen's division to bind the union" (*id.* at 236). The court distinguished the case before it from cases where "the officers of the union had been performing the mere normal functions of their offices" (*ibid.*). In the present case, ASME's officers performed their expressly delegated functions and the misleading interpretation they disseminated bore all the indicia of a formal ruling of the association.

[20] When the principal holds out apparent authority by lending its reputation and facilities to the agent, imposition of vicarious

Indeed, application of the apparent authority doctrine to impose vicarious antitrust liability on corporations, notwithstanding the dishonest motivation of their agents, is consistent with the accepted principle that corporations are liable for antitrust violations of agents acting within the scope of their employment even if those agents act in contravention of the express orders, policies, and wishes of the company. See, *e.g.*, *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971).

III. Requiring ASME To Account For The Misconduct Of Its Agents, Who Exercised Expressly Delegated Power To Regulate The Competitive Process, Will Further The Procompetitive Goals Of The Federal Antitrust Laws

ASME concludes its argument in this Court (Br. 43) by urging that an exception from traditional principles of

---

liability has received universal recognition. See, *e.g.*, 2 F. Mechem, *Agency* 1557 (2d ed. 1914) (collecting cases); 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, *supra*, at 400-401. See also *Standard Surety & Casualty Co.* v. *Plantsville National Bank*, 158 F.2d 422, 424 (2d Cir. 1946); *Bowman* v. *Home Life Insurance Co.*, 243 F.2d 331, 334-335 (3d Cir. 1957); *Hester* v. *New Amsterdam Casualty Co.*, 412 F.2d 505, 509-510 (4th Cir. 1969); *United States* v. *Sanchez*, 521 F.2d 244, 246 (5th Cir. 1975); *Holloway* v. *Howerdd*, 536 F.2d 690, 695-696 (6th Cir. 1976); *National Acceptance Co. of America* v. *Coal Producers Association, Inc.*, 604 F.2d 540, 542-543 (7th Cir. 1979); *Employers' Liability Assurance Corp.* v. *L. J. Marcotte Insurance Agency*, 314 F.2d 470, 474-478 (8th Cir. 1963); *Dark* v. *United States*, 641 F.2d 805, 807-808 (9th Cir. 1981); *Gilmore* v. *Constitution Life Insurance Co.*, 502 F.2d 1344, 1348-1350 (10th Cir. 1974). *United Mine Workers* v. *Coronado Coal Co.*, *supra*, 259 U.S. at 395, refers to the same doctrine in the antitrust context. Although the Court found that the principal in that case was not liable, it was quick to emphasize that "[h]ere it is not a question of * * * holding out an appearance of authority on which some third person acts."

respondeat superior is necessitated by "the role that organizations, like ASME, actually play in the life of our nation." Thus, in view of the public service goals of such organizations, and their large size and multitudinous membership, liability should not be imposed for acts of agents that "are intended to benefit third parties and are undertaken without the knowledge or consent of the organization" (*ibid.*).

1. The practical consequences of bestowing the immunity that ASME seeks are sufficiently clear. Code-making organizations such as ASME, which are made up of members employed in the same industries that are subject to oversight by those organizations (Pet. App. A-16), are fraught with potential conflicts of interest. As the facts in this case show, officers of ASME were placed in a position to "legislate" in favor of their own companies and thereby preserve a monopoly position (J. App. 86).

Under ASME's proposed rule of agency law, intentional misconduct by such persons, who execute their anticompetitive schemes through the code-making body itself, could not be imputed to the code-making body if it withheld its "consent" and avoided "knowledge" of the misconduct. Thus, the threat of treble damages would engender a "see no evil" attitude on the part of the highest ranking officials in the code-making body. Precisely because of the existence of the treble-damage penalty—a penalty that Congress prescribed to deter anticompetitive practices—code-making organizations would have a strong incentive to *minimize* their supervision and investigation of potentially anticompetitive practices. To the extent that the organization succeeded in looking the other way, it would be free from liability and could rely with confidence on the defense that the acts of its agents were "undertaken without the knowledge or consent of the organization."

On the other hand, imposition of liability on code-making bodies such as ASME, whose agents impose unreasonable restraints on trade through the exercise of their official powers, will encourage the adoption of pro-

cedural safeguards to prevent such abuses. "Thus pressure is brought on those who [control] the entity to see to it that their agents abide by the law." *United States* v. *A & P Trucking Co.*, *supra*, 358 U.S. at 126. While punishment of individual agents alone is often "ineffective as a deterrent," punishment of the "business entity itself is likely to be both appropriate and effective" in assuring future compliance by all agents serving the entity. *United States* v. *Hilton Hotels Corp.*, *supra*, 467 F.2d at 1006.

Imposition of liability based on the traditional principles of agency law that we have summarized above would not, as ASME suggests, result in ruinous liability for code-making organizations. Indeed, ASME asserts (Br. 45 n.*) that it has administered its Codes for "nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case." It also states (*ibid.*) that other code-making organizations, which have appeared as amici in this case, "have maintained similar exemplary records." While these unqualified assertions are open to question, the relative infrequency of episodes of misconduct demonstrates that imposition of liability in a case such as this would not have ruinous consequences. But imposition of liability would provide a continuing incentive for code-making bodies to adopt effective procedures to prevent a repetition of the misconduct disclosed by the record in this case.[21]

Thus, it is in the power of the code-making body itself to obtain substantial protection against antitrust claims. Associations such as ASME should effectively warn their agents about potential conflicts of interest inherent in

---

[21] The threat of private litigation also would provide an incentive for code-making bodies to correct illegal restraints of trade inflicted by their agents when the facts are brought to their attention by an injured party. A prompt, unequivocal retraction, communicated effectively to the injured party's customers, would protect the injured party from continuing competitive harm and mitigate any claim for damages. By contrast, immunity from liability would significantly reduce the incentive to rectify such competitively harmful errors in a prompt and forthright manner.

their work and forbid them to "legislate" (see J. App. 86) invidiously against the products of disfavored firms. Perceived infractions of conflict of interest standards should be dealt with through appropriate disciplinary procedures.[22] These steps alone would further reduce the incidence of anticompetitive practices that ASME claims are "rare" occurrences.

In addition, despite the existence of a large volume of requests for Code interpretations, it is within the power of ASME to require review of interpretations that effectively prohibit the marketing of products with particular features. In the present case, while full committee review of Hardin's draft response may not have been necessary, a careful and objective check by another Subcommittee member familiar with the relevant provisions of the Code would have revealed the deliberate error introduced in the draft response by Hardin and James (see J. App. 124-126). Had ASME provided that additional check, it is probable that it would have avoided the present litigation and spared Hydrolevel the competitive injury that it suffered (see J. App. 109).[23]

---

[22] In the present case, ASME's investigation of the activities of Mr. James resulted in a resolution—cleared by James himself as a "courtesy"—exonerating James and actually praising his behavior (H. Exh. V. 289-291; J. App. 103-104, 108-109). This occurred even though the conspirators "intentionally misinterpreted the Code" (Pet. App. A-12), and the underlying facts were brought to ASME's attention by Hydrolevel's complaints, extensive newspaper publicity, congressional hearings, and expressions of concern from ASME's top officials (J. App. 94-98, 99-100, 105-107, 108-109; see also *Hearings on Voluntary Industrial Standards Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 196 (1975)).

[23] Contrary to ASME's assertion (Br. 36), the court of appeals' reference to the absence of procedural safeguards in this case does not reflect the adoption of a "negligence" standard. The jury was charged that it could not impose liability on the basis of negligence alone, and the court of appeals emphasized that liability rested on the intentional misconduct of ASME's agents (see pages 10-12, *supra*). Nonetheless, application of the doc-

2. As this Court frequently has stated, the very purpose of the treble damage remedy is to "deter violators." *Pfizer, Inc.* v. *India*, 434 U.S. 308, 314 (1978). "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging * * * challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979).

To assure effective deterrence of anticompetitive practices, Congress cast a broad net. "Every person" who engages in anticompetitive practices is exposed to liability. 15 U.S.C. 1, 2 and 7. Beyond this, Congress has provided in unequivocal terms that *both* corporations and their agents should feel the effect of the sanctions it has prescribed. Section 14 of the Clayton Act, 15 U.S.C. 24, provides that whenever a "corporation" has committed a violation of the antitrust laws through the actions of its agents, that violation "also" is deemed to be that of the individual "officers or agents" who have "done any of the acts constituting in whole or in part such violation * * *." Section 14 "was intended to be a * * * mandate to prosecutors to bring *all* responsible persons to justice." *United States* v. *Wise*, 370 U.S. 405, 414 (1962) (emphasis supplied).[24]

In view of Congress' manifest purpose to spread broadly the net of liability to enmesh all participants in

---

trine of *respondeat superior* in cases of this kind encourages reasonable care on the part of principals to guard against anticompetitive abuses by their agents. Indeed, this is the central policy objective of the doctrine.

[24] While Section 14 of the Clayton Act, 15 U.S.C. 24, sought to assure punishment of individual agents along with their corporate principals, the proponents of the provision recognized that "the corporation itself" is liable because it "must act through individuals." 51 Cong. Rec. 9676 (1914) (remarks of Reps. Mann and Floyd). Thus, Section 14 was one of several provisions intended "to restore the strength of the statute and to make it more drastic and all-embracing." 51 Cong. Rec. 15820 (1914) (remarks of Sen. Reed).

anticompetitive schemes and achieve effective deterrence, it would be wholly inappropriate to dilute traditional principles of *respondeat superior* in antitrust litigation.[25] Indeed, this Court's decisions establish that, rather than raising barriers to liability above those existing at common law, courts should construe common law principles flexibly to assure effective deterrence. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968) (the Court "has often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes"). *Perma Life Mufflers* added that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139. If traditional common law principles must be construed flexibly to safeguard the effectiveness of treble-damage actions, then it follows *a fortiori* that barriers to relief in addition to those recognized at common law should not be erected in antitrust cases—which involve harm to the public interest in competition as well as private injury. And for this reason alone, ASME's request for immunity from the common law doctrine of *respondeat superior* should be rejected.

3. Finally, a still more fundamental reason for sustaining liability against a code-making body such as ASME, when its agents misuse their expressly-delegated authority and impose anticompetitive restraints, resides in what ASME refers to as "the role that organizations like ASME actually play in the life of our nation" (Br. 43). We do not for a moment question the substantial

---

[25] In suggesting that imposition of vicarious antitrust liability is inappropriate because the treble damage remedy is partly punitive in nature (ASME Br. 32-33, 46), ASME appears to be asking this Court to create an implied exemption for it and similar entities. However, antitrust exemptions should not be implied absent a clear indication of legislative intent, and ASME does not purport to base its argument on legislative intent. As discussed below, Congress' deterrent purpose would be frustrated by creating the immunity from treble-damage liability that ASME seeks.

social contribution made by organizations such as ASME. But it cannot be disputed that ASME is a standard-prescribing body whose actions effectively govern competitive entry of new products into numerous lines of commerce. As the facts in this case demonstrate, a ruling by ASME that a product is dangerous or not in compliance with its Code can deprive a manufacturer of its customers. ASME itself acknowledges that its Code is implemented by governmental authority in 46 states and in all but one of the Canadian provinces (Br. 5). Thus, "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce * * *." *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941). See also *Associated Press* v. *United States*, *supra*, 326 U.S. at 14-19.

Application of the antitrust laws to "extra-governmental agenc[ies]," which otherwise would wield essentially legislative powers without check by public authority, is necessary to assure the survival of competitive conditions in the lines of commerce that are subject to their code-making activities. Indeed, exposure to actions such as the present private damage action will spur organizations such as ASME—which hold substantial power to affect adversely the public interest in competition—to adopt the very kinds of procedural safeguards which this Court has determined to be essential to avoid antitrust violations in similar cases. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365 n.18 (1963) ("a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis"); *Radiant Burners, Inc.* v. *Peoples Gas Light Co.*, *supra*, 364 U.S. at 658-660 (sustaining an antitrust complaint alleging that a code-making association barred a new product without applying "objective standards" and as a consequence of pressure from "competitors").[26]

---

[26] *Silver* and *Radiant Burners* underscore the appropriateness of applying traditional principles of *respondeat superior* in a case

In short, consideration of "the role that organizations like ASME actually play in the life of our nation" (ASME Br. 43) strongly militates against the legal conclusion that ASME invites this Court to draw. The purpose of the federal antitrust laws to preserve competitive conditions through effective deterrence of unreasonable restraints of trade requires that organizations such as ASME, which delegate quasi-legislative powers to their agents, bear responsibility for unreasonable restraints of trade intentionally inflicted by those agents in the exercise of their official powers.[27]

---

such as this. While ASME protests that imposition of liability is fundamentally unfair, it ignores the fact that it placed in the hands of its officers quasi-legislative power to proscribe the product of a disfavored competitor, and did so without providing procedures to assure accuracy and fairness. As the court of appeals observed, "no individual should be empowered to rule dispositively on the fitness of a competitor's product" (Pet. App. A-16). And, as *Silver* emphasized, liability is properly imposed on associations that permit "anticompetitive collective action * * * without according fair procedures." 373 U.S. at 364. See also D. Turner, *Consumer Protection By Private Joint Action*, Antitrust Law Symposium 36, 42-43 (1967).

[27] Of course, in contending that ASME is liable for antitrust violations resulting from the intentional anticompetitive practices of its officers exercising code-interpretation powers, we do not suggest that code-making activities are undesirable or should expose participants to liability simply because a particular competitor is hindered. For example, a good faith interpretation of a code provision reasonably designed to promote safety, which is surrounded with appropriate procedural safeguards, would not violate the "rule of reason" since such an interpretation would have the procompetitive effect of truthfully informing consumers. See *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 360 ("under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out [its] mandate * * *"). Courts applying the rule of reason to associations promulgating rules or standards have approved association decisions that comply with basic requirements of procedural and substantive fairness. See, *e.g.*, *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646, 651-654 (5th Cir. 1977); *Eliason Corp.* v. *National Sanitation Foundation*, 614 F.2d 126, 128-131 (6th Cir. 1980); see also Note, *Trade Association*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

BARRY GROSSMAN
MARK C. DEL BIANCO
Attorneys

ERNEST J. ISENSTADT
Acting General Counsel
Federal Trade Commission

OCTOBER 1981

Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Colum. L. Rev. 1486, 1508-1510 (1966) ("the added cost of setting up such a fair procedure is a small price to pay for the privilege of self-regulation"); L. Sullivan, *Antitrust* 247-253 (1977).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 356391 634